

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

5 ROGER J. HOWARD, JR.,)
6 Plaintiff,) No. CV-09-096-CI
7 v.) ORDER DENYING PLAINTIFF'S
8 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
9 of Social Security,) AND GRANTING DEFENDANT'S
10 Defendant.) MOTION FOR SUMMARY JUDGMENT
11)

12 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct.
13 Rec. 13, 16.) Attorney Maureen J. Rosette represents Roger J.
14 Howard (Plaintiff); Special Assistant United States Attorney
15 Stephanie R. Martz represents the Commissioner of Social Security
16 (Defendant). The parties have consented to proceed before a
17 magistrate judge. (Ct. Rec. 8.) After reviewing the administrative
18 record and briefs filed by the parties, the court **DENIES** Plaintiff's
19 Motion for Summary Judgment, and directs entry of judgment for
20 Defendant.

JURISDICTION

22 Plaintiff protectively filed for disability insurance benefits
23 (DIB) and supplemental security income (SSI) in September 2005.
24 (Tr. 79, 203.) He alleged disability due "problems with [his]
25 knees," with an amended alleged onset date of February 1, 2002.
26 (Tr. 74, 238.) His claims were denied initially and on
27 reconsideration. (Tr. 31, 195.) Plaintiff requested a hearing
28 before an administrative law judge (ALJ), which was held on

1 September 27, 2007, before ALJ Paul Gaughen. (Tr. 222-56.)
2 Plaintiff, who was represented by counsel, and vocational expert T.
3 Moreland (VE) testified. The ALJ denied benefits on November 27,
4 2007, and the Appeals Council denied review. (Tr. 5-7, 16-25.) The
5 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript
8 of proceedings, and are briefly summarized here. At the time of the
9 hearing, Plaintiff was 43 years old. (Tr. 227.) He had a high school
10 education and had attended some college courses. (Tr. 228.)
11 Plaintiff was married and lived with his spouse, who worked outside
12 the home. He had past work experience as a postal clerk, a heavy
13 equipment operator, and a maintenance worker. (Tr. 98.) He
14 testified he could no longer work because of swelling and pain in
15 his knees and lower legs. He stated he had been on crutches since
16 May 2007, and he could not walk without them. (Tr. 298-99.) He
17 testified he could sit for one half hour, stand for 30 minutes at a
18 time, walk 200 to 300 feet, and lift 30 pounds. He also stated he
19 could not climb stairs. He reported he drives with a manual
20 transmission, watches television four to six hours a day and reads
21 two to three hours a day. He also cooks during the day. (Tr. 231-
22 35.)

23 **ADMINISTRATIVE DECISION**

24 At step one, ALJ Gaughen found Plaintiff had not engaged in
25 substantial gainful activity since the alleged onset date as amended
26 at the hearing. (Tr. 18.) At step two, he found Plaintiff had
27 severe impairments of "alcohol addiction; bilateral degenerative
28

1 arthritis to both knees; and quadriceps atrophy as well as
 2 peripheral neuropathic findings affecting bilateral lower
 3 extremities indicative of underlying neurologic disease, possibly
 4 spinal stenosis versus metabolic neurologic process, which would
 5 attribute to peripheral neuropathy." (Tr. 18-19.) He found non-
 6 severe impairments of Marfan syndrome, ulcers and gastrointestinal
 7 bleeds did not result in work-related limitations. (Tr. 20-21.) At
 8 step three, the ALJ determined Plaintiff's impairments, alone and in
 9 combination, did not meet or medically equal one of the listed
 10 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
 11 (Listings). (Tr. 21.) After discussing Plaintiff's testimony, he
 12 found Plaintiff's statements regarding the intensity and limiting
 13 effects of his symptoms were not entirely credible. (Tr. 22-23.) At
 14 step four, he determined Plaintiff had the residual functional
 15 capacity (RFC) to perform sedentary work with additional
 16 limitations. Based on VE testimony, he found Plaintiff could not
 17 perform his past relevant work. (Tr. 21, 23.) Proceeding to step
 18 five, ALJ Gaughen determined Plaintiff was able to perform other
 19 jobs in the electronic assembly occupations that existed in
 20 significant numbers in the national economy. (Tr. 24.) He
 21 concluded Plaintiff was not under a "disability" as defined by the
 22 Social Security Act at any time through the date of his decision.
 23 (Tr. 25.)

24 STANDARD OF REVIEW

25 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 26 court set out the standard of review:

27 A district court's order upholding the Commissioner's
 28 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,

1 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 2 Commissioner may be reversed only if it is not supported
 3 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 4 Substantial evidence is defined as being more than a mere
 5 scintilla, but less than a preponderance. *Id.* at 1098.
 6 Put another way, substantial evidence is such relevant
 7 evidence as a reasonable mind might accept as adequate to
 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 than one rational interpretation, the court may not
 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

8 The ALJ is responsible for determining credibility,
 9 resolving conflicts in medical testimony, and resolving
 10 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 11 Cir. 1995). The ALJ's determinations of law are reviewed
 12 *de novo*, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

13 **SEQUENTIAL PROCESS**

14 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 15 requirements necessary to establish disability:

16 Under the Social Security Act, individuals who are
 17 "under a disability" are eligible to receive benefits. 42
 18 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 19 medically determinable physical or mental impairment"
 which prevents one from engaging "in any substantial
 20 gainful activity" and is expected to result in death or
 last "for a continuous period of not less than 12 months."
 21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 from "anatomical, physiological, or psychological
 22 abnormalities which are demonstrable by medically
 acceptable clinical and laboratory diagnostic techniques."
 23 42 U.S.C. § 423(d)(3). The Act also provides that a
 24 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 25 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 26 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 27 vocational components.

28 In evaluating whether a claimant suffers from a
 disability, an ALJ must apply a five-step sequential
 inquiry addressing both components of the definition,

1 until a question is answered affirmatively or negatively
 2 in such a way that an ultimate determination can be made.
 3 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 4 claimant bears the burden of proving that [s]he is
 5 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

6 It is the role of the trier of fact, not this court, to resolve
 7 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 8 supports more than one rational interpretation, the court may not
 9 substitute its judgment for that of the Commissioner. *Tackett*, 180
 10 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 11 Nevertheless, a decision supported by substantial evidence will
 12 still be set aside if the proper legal standards were not applied in
 13 weighing the evidence and making the decision. *Brawner v. Secretary*
 14 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 15 there is substantial evidence to support the administrative
 16 findings, or if there is conflicting evidence that will support a
 17 finding of either disability or non-disability, the finding of the
 18 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 19 1230 (9th Cir. 1987).

20 ISSUES

21 The question is whether the ALJ's decision is supported by
 22 substantial evidence and free of legal error. Plaintiff argues the
 23 ALJ committed reversible error in his credibility findings and
 24 failed to include all of his limitations in the hypothetical
 25 question presented to the VE at step five. (Ct. Rec. 14 at 15, 18.)

26 DISCUSSION

27 Plaintiff claims error in the Commissioner's credibility
 28

1 determination. He contends the ALJ failed to specifically reject
2 his testimony that he could only walk 200 to 300 yards, and that he
3 needed to elevate his legs above his heart; he also suggests the ALJ
4 did not properly reject his self-reported limited abilities to
5 "stand, walk, squat and climb." (*Id.*) He argues proper
6 consideration of these limitations at step five would have resulted
7 in a finding of disability. (*Id.*)

8 When the ALJ finds a claimant's statements as to the severity
9 of impairments, pain and limitations are not credible, the ALJ must
10 make a credibility determination with findings sufficiently specific
11 to permit the court to conclude the ALJ did not arbitrarily
12 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,
13 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
14 (9th Cir. 1991) (en banc). However, that an ALJ cannot be required
15 to believe every allegation of disabling pain, even when medical
16 evidence exists that a claimant's condition may produce pain. "Many
17 medical conditions produce pain not severe enough to preclude
18 gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
19 1989). Although an adjudicator may not reject a claimant's extreme
20 symptom complaints solely on a lack of objective medical evidence,
21 medical evidence is a relevant factor to consider. *Social Security*
22 *Ruling (SSR)* 96-7p.

23 If there is no affirmative evidence that the claimant is
24 malingering, the ALJ must provide "clear and convincing" reasons for
25 rejecting the claimant's allegations regarding the severity of
26 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
27 ALJ engages in a two-step analysis in deciding whether to admit a
28

1 claimant's subjective symptom testimony. *Lingenfelter v. Astrue*, 504
2 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273,
3 1281 (9th Cir. 1996). Under the first step, the ALJ must find the
4 claimant has produced objective medical evidence of an underlying
5 "impairment," and that the impairment, or combination of
6 impairments, could reasonably be expected to cause "some degree of
7 the symptom." *Lingenfelter*, 504 F.3d at 1036. Once the first test
8 is met, the ALJ must evaluate the credibility of the claimant and
9 make specific findings supported by "clear and convincing" reasons.

10 *Id.*

11 In addition to ordinary techniques of credibility evaluation,
12 the ALJ may consider the following factors when weighing the
13 claimant's credibility: the claimant's reputation for truthfulness;
14 inconsistencies either in his allegations of limitations or between
15 his statements and conduct; daily activities and work record; and
16 testimony from physicians and third parties concerning the nature,
17 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
18 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d at 597 n.5.
19 The ALJ may also consider an unexplained failure to follow treatment
20 recommendations and testimony by the claimant "that appears less
21 than candid." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
22 2008).

23 As explained by the Commissioner in his policy ruling, the ALJ
24 need not totally reject a claimant's statements; he may find the
25 claimant's statements about pain to be credible to a certain degree,
26 but discount statements based on his interpretation of evidence in
27 the record as a whole. *SSR 96-7p*. "For example, an adjudicator may
28

1 find credible an individual's statement as to the extent of the
2 functional limitations or restrictions due to symptoms; *i.e.*, that
3 the individual's abilities to lift and carry are compromised, but
4 not to the degree alleged." *Id.* Subjective complaints alone cannot
5 be the basis for a finding of disability. *Id.* If the ALJ's
6 credibility finding is supported by substantial evidence in the
7 record, "the court may not engage in second-guessing." *Thomas*, 278
8 F.3d at 959; *Fair*, 885 F.2d at 604 ("credibility determinations are
9 the province of the ALJ").

10 **A. Credibility Findings**

11 Here, there is no evidence of malingering; therefore the
12 Commissioner's credibility findings must be supported by "clear and
13 convincing" reasons. After a discussion of the medical evidence,
14 the ALJ found Plaintiff could perform sedentary work with the
15 following limitations:

16 [Plaintiff] has the residual functional capacity to
17 occasionally lift 30 pounds and can carry this weight for
18 short distances; walk 30 to 40 yards [90 to 120 feet]; can
19 stand one to two hours at a time if not required to make
20 sudden or jerking movements; can sit six hours in an
21 eight-hour workday; can be on his feet for two hours in an
eight-hour workday; cannot perform any significant
squatting or kneeling or use foot controls; can
occasionally bend and stoop; no exposure to industrial
vibrations or unprotected heights; and cannot work where
open alcohol containers are present.

22 (Tr. 21, 23.) In explaining the basis for his RFC determination,
23 the ALJ found Plaintiff's medically determinable impairments
24 reasonably could be expected to produce symptoms alleged. (Tr. 21.)
25 He then summarized Plaintiff's testimony, specifically noting his
26 statements that he only could sit for 30 minutes, stand 30 minutes
27 with his crutches, walk 200-300 feet (which is equivalent to 67 to
28 100 yards), lift 30 pounds but carry no weight, and could neither

1 climb stairs nor squat. (Tr. 22.) He also referenced Plaintiff's
2 testimony that he drove a vehicle with a manual transmission, using
3 his left leg to shift and brake. (Tr. 22.)

4 As seen above, the ALJ incorporated a more restrictive
5 limitation on Plaintiff's ability to walk (30-40 yards) than the
6 Plaintiff's testimony (200-300 feet, i.e., 67-100 yds). (Tr. 235.)
7 Therefore, the ALJ was not obliged to specifically reject this
8 testimony. Regarding the self-reported limitation in climbing, the
9 ALJ found Plaintiff could perform the sedentary job of "electronics
10 assembler", which does not require climbing. (Tr. 24.) See, e.g.,
11 DICTIONARY OF OCCUPATIONAL TITLES, 4th ed. rev. 1991, no. 726.684-110.
12 Thus, the omission of a climbing limitation in the final RFC
13 determination is harmless error. See *Stubbs-Danielson v. Astrue*,
14 539 F.3d 1169, 1174 (9th Cir. 2008); *Johnson v. Shalala*, 60 F.3d
15 1428, 1436 n.9 (9th Cir. 1995) (where correction of error does not
16 change result, error is harmless); *SSR* 96-9p.

17 Citing "clear and convincing" reasons, the ALJ set forth
18 specific credibility findings and discounted Plaintiff's testimony
19 that he could only sit 30 minutes, did not do yard work, and could
20 not stand. (Tr. 22-23.) He first noted inconsistencies between
21 Plaintiff's testimony and other evidence in the record. (Tr. 23.)
22 This is a proper reason for discounting a claimant's testimony.
23 *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). For example,
24 the ALJ referenced evidence in the record from examining physician
25 Robert Rose, M.D., and Plaintiff's spouse that is inconsistent with
26 Plaintiff's testimony regarding his ability to do yard work, sit and
27 stand. The ALJ also found Plaintiff failed to follow-up with
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1 treatment for his knees, and his claims of being unable to afford
2 medical care were unconvincing, in light of public facilities
3 available for people who needed care. (Tr. 23.) As found by the
4 ALJ, Plaintiff provided no evidence that he had been denied medical
5 treatment from public clinics.

6 Although lack of treatment and failure to follow treatment
7 recommendations are proper considerations in the credibility
8 determination, *Burch, supra*; *Tommasetti*, 533 F.3d at 1039, the
9 adjudicator must not draw inferences about an individual's symptoms
10 and their functional effects from a failure to seek or pursue
11 regular medical treatment without first considering claimant's
12 explanation for his failure to seek treatment. *SSR 96-7p*. Such
13 explanations may include that the claimant is living with symptoms,
14 financial concerns prevent the claimant from seeking treatment; the
15 claimant has been told that there is no further, effective treatment
16 that would be of benefit; and that the claimant may structure his or
17 her daily activities so as to minimize symptoms to a tolerable level
18 or eliminate them entirely. *Id.* Here, the record supports the
19 ALJ's reasoning regarding Plaintiff's failure to follow treatment
20 recommendation. For example, Plaintiff was referred to Community
21 Health Association of Spokane in April 2007 (but did not access care
22 there until November 19, 2008), and actually did seek treatment on
23 May 8, 2007, from Christ Clinic, where he was advised again to wear
24 his knee immobilizer. (Tr. 192.) There is also evidence that in
25 April 2004, he was advised to seek follow-up medical attention at
26 Veterans' Hospital, where he had been treated in the past. (Tr.
27 146.) However, in all three instances, he failed to follow-up as
28 advised by the treating providers. (Tr. 174, 192, 201A.)

1 Other clear, convincing and specific reasons given by the ALJ
 2 for discrediting the severity of Plaintiff's alleged limitations
 3 (such as the complete inability to carry any weight) include:
 4 significant gaps in medical treatment for his knee; the lack of
 5 medical evidence to support the degree of limitation alleged; and no
 6 acceptable medical opinion that Plaintiff was completely unable to
 7 work. (Tr. 23.) A review of the record in its entirety confirms
 8 the ALJ's credibility findings are supported by substantial
 9 evidence, reflect a rational interpretation of the record in its
 10 entirety, and are free of legal error. See *SSR 96-7p*. As such, the
 11 Commissioner's credibility determination may not be disturbed.
 12 *Tackett*, 180 F.3d at 1097.

13 **B. Step Five: Hypothetical Question**

14 At step five, the burden of proof shifts to the Commissioner to
 15 show there are a significant number of jobs in the national economy
 16 that Plaintiff can still perform. *Kail v. Heckler*, 722 F.2d 1496,
 17 1498 (9th Cir. 1984). The ALJ may rely on vocational expert
 18 testimony if the hypothetical presented to the expert includes all
 19 functional limitations supported by the record and found credible by
 20 the ALJ. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).
 21 Plaintiff asserts the ALJ's hypothetical to the VE (and the final
 22 RFC determination)¹ at step five was incomplete because it did not

23
 24 ¹ The hypothetical relied upon by the VE at step five is
 25 consistent with the ALJ's final RFC findings. At the hearing, the
 26 ALJ presented an individual with the following limitations:

27 Due to impairment to the knees, you, you should know that
 28 his ability to do some light exertion with limits is
 compromised as follows: He could occasionally lift about

1 include a need "to elevate his feet above heart height" to reduce
 2 swelling of his knees. (Ct. Rec. 14 at 15.) However, this
 3 requirement was not mentioned in Plaintiff's hearing testimony.
 4 Rather, Plaintiff's representative presented this limitation to the
 5 VE at the hearing, after which the VE concluded this requirement
 6 would "have a serious effect on any sedentary work." (Tr. 253-54.)
 7 The hearing transcript shows Plaintiff testified his right knee was
 8 permanently swollen and his left knee swelled up a couple of times
 9 a month. He stated he used ice and a knee brace to reduce swelling,
 10 and raised and lowered his legs because of pain. (Tr. 232.)
 11 However, the medical records show as of May 8, 2007, he was not
 12 using his knee brace. (Tr. 191.) When discussing his knee
 13 condition, he did not mention the recommendation or practice of
 14 raising his legs or feet above his heart. (Tr. 224-40.)

15 Plaintiff's reply that the medical record supports the

16 30 pounds in performing work activities, but could carry
 17 same for just short distances. Can walk about 30 to 40
 18 yards at a time, could stand for one to two hours at a
 19 time, if not required to make sudden or jerking movements
 to twist the body such that he might stress the knees,
 etcetera, with an undemanding standing posture -

20 . . .

21 . . . He can't work in a, on a floor where there's going
 22 to be vibrations, heavy industrial vibrations, etcetera,
 23 and he can't walk in unprotected heights. He couldn't get
 up on a scaffold or a ladder because of his knee
 impairment. Please assume that in an eight-hour day, the
 worker could be on his feet for two hours out of eight.

24 . . . could work in a seated position for six hours out of
 25 eight. If you're going to sit/stand alternating option
 [sic], can work a full day, eight out of eight. Can
 occasionally bend or stoop. No significant squatting or
 kneeling or use of foot controls. And lastly, on the
 positive end of the scale, he has unimpaired use of the
 27 hands and fingers.

28 (Tr. 244-45.)

inclusion of this requirement in the hypothetical and final RFC is unpersuasive. (Ct. Rec. 18 at 2.) There is brief notation in an April 25, 2007, report from an emergency room physician's assistant advising Plaintiff to wear his knee immobilizer "at all times and only remove to shower"; and to "elevate his feet above his heart to decrease swelling." (Tr. 142.) Plaintiff was also advised to follow up with an orthopedic specialist. (*Id.*) However, Plaintiff did not testify that he followed this advice. Rather, he testified some days his knees feel better than others, and on days when they hurt he "elevate[s] them and lift[s] them up and then recline[s] them back down." (Tr. 232.) Because there was no testimony of an ongoing need to elevate his feet above his heart, the ALJ was not required to reject it in his credibility findings. Further, the ALJ was under no obligation to accept as true the restriction propounded by Plaintiff's counsel. *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989). Because a requirement to elevate the knees above the heart is not supported by substantial evidence, the ALJ did not err by omitting the claimed restriction in his hypothetical to the VE. *Bayliss*, 427 F.3d at 1217.

CONCLUSION

The ALJ's evaluation of the medical record in its entirety is supported by substantial evidence and free of legal error. The RFC determination properly reflects restrictions and limitations supported by objective medical evidence, as well Plaintiff's own credible testimony. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 13) is DENIED;

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 13

2. Defendant's Motion for Summary Judgment (Ct. Rec. 16) is
GRANTED.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant.

DATED February 2, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE